

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 152,623

ORDER

ON the 12th day of April, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated March 2, 1994, came on for oral argument in Wichita, Kansas.

APPEARANCES

The claimant appeared by and through her attorney, Andrew E. Busch of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on November 24, 1989.
- (2) What is the nature and extent of claimant's injury and disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant, a waitress at the Wichita Greyhound Park, suffered accidental injury arising out of and in the course of her employment with Wichita Greyhound Park on November 24, 1989.

Claimant was carrying a tub of ashtrays weighing approximately fifty (50) pounds on the day of the alleged injury. As she went through a kitchen door, she felt something pop, pull or snap in her neck. Her supervisor was advised the next day. She was allowed to seek treatment by her own doctor, a Dr. Thompson whose medical records are not a part of the record. She was treated conservatively with drugs until mid-January, 1990, at which time she was referred to Dr. Anthony Pollock, a board-certified orthopedic surgeon in Wichita, Kansas. Dr. Pollock diagnosed a strain of the left shoulder and reviewed x-rays which showed pre-existing scoliosis in the cervical spine. This reverse curvature of the cervical spine at the C4-5 level did not indicate instability of the spine and Dr. Pollock was unable to ascertain the reason for this curvature. Claimant also had numerous subjective complaints. Dr. Pollock returned claimant to work on March 26, 1990, but removed her from work due to her ongoing problems and injected her on April 6, 1990. He examined claimant again on February 15, 1991. He, at that time, released her to light work with a ten (10) pound lifting restriction. Claimant returned to Dr. Pollock on March 10, 1992, subsequent to being involved in an automobile accident and subsequent to undergoing a C5-6 discectomy with Dr. Klafta. Dr. Pollock felt claimant's condition had worsened after the automobile accident. He was provided the five percent (5%) functional impairment rating opinion of Dr. Horsley and felt that rating would be appropriate.

Dr. Pollock opined claimant had taken an inordinately long time to recover from this injury and he strongly encouraged her to return to work.

Claimant was treated at various times by Dr. Pollock, Dr. Horsley, Dr. Fleming, Dr. Thompson, Dr. Klafta, Dr. Frank Kutilek, III, Dr. Mills, and Dr. Frank Kutilek, Jr., father of Dr. Frank Kutilek, III. With this abundance of medical available, the parties saw fit only to depose Dr. Pollock and Dr. Frank Kutilek, III. Dr. Kutilek (here after referred to as Dr. Kutilek, III), an osteopath who works with his father (here after referred to as Dr. Kutilek), did not see claimant until after the automobile accident in May 1991. His testimony regarding her pre-existing condition before the automobile accident stems totally from his review of the medical notes provided during his father's treatment of claimant which began February 11, 1991. Dr. Kutilek, III, in reviewing these records, agreed they were not very thorough and agreed Dr. Kutilek at times provided only his best guesstimate.

He was also provided medical records from Dr. Pollock and Dr. Klafta, but used only the records of his father in forming his opinion regarding the claimant. Dr. Kutilek, III, rated claimant at nineteen percent (19%) whole body on a functional basis and included in his

rating the cervical pain, C-6 weakness, C-7 weakness, and left upper extremity losses. He agreed claimant's symptomatology was increased after the automobile accident and described the May 5, 1991, automobile accident as "the straw that broke the camel's back" which triggered the acute herniation of C5-6.

While K.S.A. 44-519 does preclude inclusion in the record the reports of any physician or surgeon where the testimony of such physician or surgeon is not admissible, the Court of Appeals in Boeing Military Airplane Co. v. Enloe, 13 Kan. App. 2d 128, 764 P.2d 462 (1988) held that K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee. Absent any objection on the part of the respondent, the testimony of Dr. Kutilek, III, will be considered as competent medical evidence and will be utilized by this Board in rendering its opinion.

Dr. Kutilek, III, opined that, as a result of this injury, claimant was not capable of performing any work involving craning of the neck or lifting over 20 pounds on a regular basis. She was further restricted to intermittent overhead work. As a result of the restrictions placed upon her, she was incapable of returning to work at her regular employment with the respondent. As no light duty was available within her restrictions and apparently no accommodation possible, claimant was forced to seek other employment.

The record indicates claimant had prior training and a prior interest in performing work as an EKG reader. At the time of the regular hearing, she was employed by St. Francis Hospital earning \$6.19 per hour and working 32 hours per week performing that task. Claimant testified this work was within her restrictions and she was physically capable of performing same as there is no lifting or physical activity involved in this job.

Claimant was evaluated by Mr. Jerry Hardin regarding her ability to earn comparable wages and her ability to perform work in the open labor market. Mr. Hardin felt claimant's ability to perform work in the open labor market had been reduced between sixty and sixty-five percent (60-65%). The Labor Market Access Plus computer program showed a loss of ability to perform work in the open labor market at sixty-two percent (62%). The Wichita labor market was used as the basis for these figures.

Mr. Hardin also compared claimant's pre-injury stipulated wage of \$309.52 with her post-injury earnings of \$198.40 per week at St. Francis Hospital, and opined she had suffered a loss of ability to earn comparable wages of thirty-six percent (36%).

Several medical reports were used by Mr. Hardin in reaching his opinion. With the exception of the report of Dr. Pollock, none of the medical reports was ever placed into evidence. These medical reports, while potentially excludable upon proper objection, were included in the record as competent medical evidence and properly used by Mr. Hardin in forming his opinions, as no objection was lodged by any party to their use.

It is the burden of proof of the claimant to establish her right to an award of compensation by proving all the various conditions upon which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The uncontradicted medical opinions of Dr. Pollock and of Dr. Kutilek indicates claimant did suffer an injury which arose out of and in the course of her employment with Wichita Greyhound Park on November 24, 1989. While the testimony of Dr. Pollock does raise some question regarding the extent of claimant's complaints and the legitimacy of her ongoing symptoms, he nevertheless does opine that she has suffered a functional impairment to her body and finds the five percent (5%) functional impairment rating of Dr. Horsley as appropriate.

K.S.A. 1992 Supp. 44-510e(a) defines functional impairment as:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

Functional impairment is significant when the permanent partial general disability is less than said functional impairment. See K.S.A. 44-510e(a). If the permanent partial general disability exceeds the functional impairment then the Court must consider whether or not the employee has a work disability for which compensation would be due.

K.S.A. 1992 Supp. 44-510e states in part:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

In this matter, claimant has returned to work for St. Francis Hospital and is earning approximately \$198.40 per week. Based upon the stipulated average weekly wage at the time of the injury of \$309.52, claimant has not returned to work at a comparable wage and the Appeals Board finds the presumption of no work disability under K.S.A. 44-510e does not apply and work disability is appropriate in this matter.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been

reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

In deciding permanent partial general disability, the Appeals Board must consider both the claimant's ability to perform work in the open labor market and the claimant's ability to earn comparable wages. No specific formula is mandated in arriving at the exact percentage of permanent partial disability but it is required that both factors be considered when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The statute is silent as to how the percentage is to be arrived at, and absent any indication as to how this is to be accomplished, the Appeals Board finds the formula set out in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), which equally weighs both the claimant's loss of ability to perform work in the open labor market and claimant's loss of ability to earn a comparable wage, to be appropriate. The Appeals Board further finds no compelling reason to give greater weight to one factor over the other.

The Appeals Board finds claimant has suffered a reduction in her ability to perform work in the open labor market of sixty-two percent (62%) and a reduction in her ability to earn comparable wage of thirty-six percent (36%). Following the formula set out in Hughes supra, the Appeals Board finds claimant has suffered a forty-nine percent (49%) permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 2, 1994, should be and is affirmed in all respects and an Award of compensation is herein entered in favor of the claimant, Janice K. Calvert Graham, and against the respondent, Wichita Greyhound Park, and its insurance carrier, National Union Fire Insurance Co., for an accidental injury on November 24, 1989.

Claimant is awarded 91.14 weeks of temporary total disability compensation at the rate of \$206.39 per week in the total sum of \$18,810.39, followed by 323.86 weeks of permanent partial disability compensation at the rate of \$101.13 per week in the sum of \$32,751.96, for a 49% permanent partial general disability, making a total award of \$51,562.35.

As of August 18, 1994, there would be due and owing to claimant 91.14 weeks of temporary total disability compensation at the rate of \$206.39 in the sum of \$18,810.39, plus 155.86 weeks permanent partial general disability at the rate of \$101.13 per week in the sum of \$15,762.12, totalling \$34,572.51 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$16,989.84 shall be paid at the rate of \$101.13 per week for 168 weeks until fully paid or until further order of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid on behalf of the claimant upon presentation of itemized statements of said expense.

Claimant's contract of employment with her attorney is approved subject to provisions of K.S.A. 44-536.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Ireland & Barber Transcript of Preliminary Hearing (3-19-91)	\$166.50
Transcript of Preliminary Hearing (10-31-91)	\$152.50
Ireland Court Reporting Transcript of Regular Hearing	\$245.29
Deposition of Anthony G. A. Pollock, M.D.	\$111.27
Barbara J. Terrell & Associates Deposition of Frank Kutilek, III, D.O.	\$87.50
Deposition of Jerry Hardin	\$97.50

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, 1540 North Broadway, Suite 205, Wichita, KS 67214
James A. Cline, 825 North Waco, Wichita, KS 67203
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director